UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BUD'S WOODFIRE OVEN, LLC d/b/a
AVA'S PIZZERIA

and

Case 05-CA-194577

RALPH D. GROVES, AN INDIVIDUAL

ANSWERING BRIEF OF THE GENERAL COUNSEL

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I. INTRODUCTION

In his decision, the Administrative Law Judge (the ALJ) found that Respondent's mandatory arbitration agreement violates the National Labor Relations Act (the Act) because it unlawfully interferes with employees' access to the Board. Respondent "recognizes the ALJ's analysis with respect to the lawfulness…under Section 8(a)(1) of the Act," but excepts to the ALJ's failure to defer this dispute to arbitration according to the principles set forth in *Collyer*, *Spielberg*, and *Babcock & Wilcox*. This is the first time Respondent has raised its argument for deferral, and the Board should consider this argument to be waived. Nonetheless, Respondent argues that the ALJ erred by failing to consider an argument that was never presented to him. The Board should find that Respondent's deferral argument is untimely, and accordingly, deny its exception.

On the merits, Respondent's deferral argument fails for several reasons, any one of them which, taken alone, is sufficient for the Board to deny Respondent's exception. Thus, and assuming for the sake of argument that *Collyer* and its progeny are the appropriate standard, the facts of this case fail to meet almost every one of the Board's requirements for deferral, not the least of which include the ALJ's undisputed finding that Respondent harbored animosity toward Charging Party Ralph Groves' protected concerted activities. Accordingly, and as described in greater detail below, the Board should deny Respondent's exception to the ALJ's decision.

II. STATEMENT OF THE CASE

On March 16, 2018, the Acting Regional Director for Region 5 of the National Labor Relations Board issued an Amended Complaint and Notice of Hearing based on a charge filed by Ralph D. Groves (Groves). The Amended Complaint alleges that Respondent violated Section

8(a)(1) of the Act when it discharged Groves for engaging in protected concerted activity, and Section 8(a)(4) and 8(a)(1) for maintaining a mandatory arbitration agreement that effectively prevented employees from access to the Board. In its Answer to the Amended Complaint, Respondent denied that it unlawfully discharged Groves, but admitted that it has maintained the arbitration agreement, and has required employees to enter into that agreement as a condition of hire and employment. A hearing was held on April 3, 2018, in Baltimore, Maryland, with ALJ Michael A. Rosas presiding. On May 18, 2018, the ALJ issued his decision.[1]

The ALJ found that Respondent violated Section 8(a)(1) by maintaining an arbitration agreement that explicitly interferes with employees' Section 7 rights to file charges and obtain remedies through the Board. The ALJ dismissed the Section 8(a)(4) allegation regarding the arbitration agreement, as well as the Section 8(a)(1) allegation regarding the discharge of Groves.

On June 29, 2018, the General Counsel filed exceptions to the ALJ's dismissal of the Section 8(a)(4) allegation and the Section 8(a)(1) discharge allegation. Respondent filed its "Limited Exceptions" to the ALJ's determination that the arbitration agreement violates the Act.

III. UNCHALLENGED FINDINGS AND CONCLUSIONS THAT RESPONDENT HAS WAIVED

Under Section 102.46(a)(1)(ii) of the Rules and Regulations of the National Labor Relations Board (the Board Rules), any exception to a ruling, finding, conclusion, or recommendation not specifically urged is deemed waived. The following findings and conclusions of the judge are among those not specifically challenged by Respondent.

[1] References to the decision appear as (ALJD page number: line number).

A. Waived Findings Regarding Respondent's Discharge of Ralph D. Groves

1. During his tenure with Respondent, Groves had a propensity for speaking up whenever he disagreed with management. (ALJD 3:6-7).
2. About one month before Respondent discharged Groves, Groves engaged in protected concerted activity. (ALJD 8:11-13).
3. Respondent's owner Chris Agharabi criticized Groves for not being a team player and urged him to be supportive of Respondent's policies. (ALJD 3:14-16).
4. Agharabi urged Groves' acquiescence to Respondent's policies because other employees looked up to him. (ALJD 8:15-16).
5. Respondent demonstrated "ample evidence" of its animus towards Groves' protected concerted activity about one month before discharging him. (ALJD 8:16-17).
6. Before discharging Groves, General Manager Brian Ball initiated the conversation with a leading question: "You don't like working here, do you?" Groves denied the accusation, insisting that he liked working there, but felt the need to speak up about things that needed to change in order for things to get better. Ball replied that he did not like that about Groves and, as a result, he was fired. (ALJD 4:10-14).
7. Ball's testimony that Groves was discharged because he sabotaged service was not credible. (ALJD 4: fn.9).
8. Respondent discharged Groves because he criticized Ball during the October 15 staff meeting for not doing anything to help out kitchen staff. (ALJD 7:25-26).
9. Ball's animus towards Groves' remarks during the October 15 meeting was demonstrated by the suspiciously close timing of, and the admitted, shifting and unsubstantiated

reasons for Groves' discharge. Those same insufficiencies also preclude Respondent from meeting its burden of establishing that it would have acted in the same manner absent the activity. (ALJD 7:31-35).

10. Groves spoke up during the meeting about working conditions that affected all of the kitchen employees. (ALJD 8:34-35).
11. Ball's penchant for standing by the wall was a topic that came up with coworkers. (ALJD 8:25-26).
12. Groves' statement, "how do you know you don't do shit around here" was consistent with the tone of the meeting set by Ball's comment that he "didn't come to work to be anybody's fucking babysitter." (ALJD 7: 27-30).

B. Waived Findings Regarding Respondent's Mandatory Arbitration Agreement

As a preliminary matter, Respondent's filing does not comply with the specificity requirements set forth in Section 102.46(a)(1)(A) of the Board's Rules. Therefore, the Board should simply disregard them entirely. In fact, it is difficult to discern something as basic the number of exception(s) filed. In the first numbered paragraph, Respondent broadly excepts to the judge's conclusion of law that its arbitration agreement violates Section 8(a)(1), but nowhere in the document does Respondent argue why the agreement does not violate the Act. To the contrary, in the very next paragraph, Respondent "recognizes the ALJ's analysis with respect to the lawfulness of a mandatory arbitration agreement under Section 8(a)(1) of the Act…" Looking at Respondent's filing as a whole, it appears to argue only that the ALJ should have deferred this matter to arbitration. The most-natural reading is that Respondent excepts to the ALJ making a finding at all (rather than deferring to arbitration), but not specifically to the underlying reasons supporting the judge's conclusion that Respondent's mandatory arbitration

agreement interferes with employees' access to the Board. In the list below, and at other locations later in this brief, the General Counsel's arguments proceed from this reading of Respondent's exception.

1. As a condition of his employment, Respondent required that Groves sign a mandatory arbitration agreement. Respondent has maintained the mandatory arbitration agreement since about May 6, 2017. The clear implication, therefore, is that employees have been required to sign the agreement as a condition of employment. (ALJD 5:40-6:2; 10:12-14)
2. Respondent's arbitration agreement clearly prohibits or interferes with the exercise of Section 7 rights. (ALJD 9:33-34).
3. Respondent failed to articulate a legitimate justification for the arbitration agreement's infringement on Section 7 rights of its employees. (ALJD 9:34-35).
4. Respondent's arbitration agreement unlawfully impedes the filing of charges with the National Labor Relations Board. (ALJD 9:46-47).
5. Respondent's arbitration agreement prohibits employees from obtaining monetary relief, such as backpay. (ALJD 10:25-26).
6. Respondent's arbitration agreement prohibits employees from any recovery, which can reasonably be construed to encompass requested relief for job reinstatement, as well as, cease and desist directives affecting other conditions of employment. (ALJD 10:26-28).
7. Employees could reasonably construe the arbitration provision as precluding them from even *testifying* at Board hearings (emphasis in original) (ALJD 10:29-30).
8. Respondent's arbitration agreement conveys the notion that it would be futile for an employee to file unfair labor practice charges since the Act's statutory remedies are beyond reach. (ALJD 10:32-34).

IV. ARGUMENT

A. Respondent's Deferral Argument Is Untimely.

Respondent asserts that the ALJ should not have declared the arbitration agreement to violate the Act, but "instead, should have recognized the Board's right-indeed, obligation – to defer the instant dispute and similar disputes to the arbitral process prescribed in that agreement." In essence, Respondent ironically argues that the issue of whether Respondent's arbitration agreement violates the Act because it interferes with employees' access to the Board, is a question that employees should not present to the Board, but must instead be presented to a private arbitrator.

The Board has long-found a contention untimely, and thus waived, when it is raised for the first time in exceptions to the Board. *Kalthia Group Hotels, Inc.*, 366 NLRB No.118, slip op. at 3, fn. 6 (2018) (employer waived its defense that it had no obligation to bargain with the union because the defense was not raised before the administrative law judge); *U.S. Services Industries, Inc.*, 315 NLRB 285, 285 (1994) (employer's defense that employees engaged in unprotected activity, and were not entitled to reinstatement was untimely, and would not be considered); *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989) (finding a waiver of employer's defense that asserted Section 8(f) in response to a Section 8(a)(5) violation because it was not raised before exceptions). Specifically, the Board has held that a party seeking deferral for the first time in its exceptions has done so too late. *SEIU United Healthcare Workers-West*, 350 NLRB 284 (2007); *Master Mechanical Insulation, Inc.*, 320 NLRB 1134, 1134 fn. 2 (1996); *Combustion Engineering*, 272 NLRB 215, 215 (1984); *Geary Ford*, 261 NLRB 1149, 1149 fn. 2 (1982);

Bourne's Transportation, 256 NLRB 281, 281 fn. 3 (1981). The Board's rationale for this rule is so that a party seeking deferral raises the issue early enough to ensure the deferral issue is fully litigated, and that the record is sufficiently complete for the Board to render an informed decision. *Combustion Engineering*, 272 NLRB at 215, citing *Geary Ford*, 261 NLRB at 1149; *MacDonald Engineering*, 202 NLRB 748, 748 (1973).

Here, Respondent did not advance its deferral argument until it filed its exception. As such, this issue has not been litigated at all, let alone fully litigated. Therefore, the General Counsel urges the Board to deny Respondent's exception seeking deferral.

B. Deferral is Not Appropriate.

Setting aside the untimely nature of Respondent's argument, the General Counsel urges the Board to dismiss the exception because deferral is inappropriate under the circumstances. First, it is undisputed that Respondent harbors animus towards its employees' exercise of protected concerted activity. Second, when confronted with a question about an arbitration agreement's interference with access to the Board in a non-union setting, the Board has evaluated the agreement, and its implications under the Act, rather than deferring to the arbitration agreement. *See Hobby Lobby Stores, Inc.*, 363 NLRB No. 195 (2016); *U-Haul Co.*,

347 NLRB 375 (2006). The Board should do the same here, and determine that deferral is not appropriate under these circumstances.[2]

i. Respondent Demonstrated Animosity Towards Employees' Exercise of Protected Rights.

Even if Respondent did not waive its deferral argument, deferral is not appropriate in these circumstances because of Respondent's demonstrated animus towards employees who exercise their rights under the Act.

The Board has deemed deferral inappropriate when there is a claim of Respondent's animosity to the employees' exercise of protected rights. *St. Francis Regional Medical Center*, 363 NLRB No. 69 slip op. at 2 (2015); *Mobil Oil Exploration & Producing, U.S., Inc.,* 325 NLRB 176, 177 (1997) (deferral to the arbitrator's decision is inappropriate where the precipitating event leading to an employees' termination is the employee's protected activity). In *St. Francis Regional*, the Board determined that the matter was not "eminently well suited to arbitration" solely on the basis of the employer's animosity towards its employees' protected rights. These cases demonstrate that employer animosity to rights protected under the Act is dispositive. Further, when an employer has engaged in prior unlawful activity, the Board has deemed subsequent similar conduct a continuation of said behavior, and found deferral inappropriate. *United Aircraft Corp.*, 204 NLRB 879, 879 (1972).

[2] Additionally, the Board does not defer Section 8(a)(4) allegations when they are intertwined with other allegations in that pleading. *United Food and Commercial Workers, Local 1776,* 325 NLRB 908, 908 fn. 2 (1998). The General Counsel alleges that Respondent's arbitration agreement violates Section 8(a)(4) and (1). Though the ALJ dismissed the Section 8(a)(4) violation, the General Counsel has filed exceptions. Therefore, given the continued pendency of this allegation before the Board, this matter is not appropriate for deferral.

Here, the ALJ determined that Respondent demonstrated "ample evidence" of its animus towards Groves because he engaged in protected concerted activity. As discussed above, Respondent did not except to this finding. Thus, the ALJ's finding is undisputed and conclusive. Therefore, Respondent's animosity is established, and the subsequent discharge of Groves should be deemed a "continuation" of Respondent's prior unlawful conduct, and deferral should be found inappropriate because the matter is not "eminently well suited to arbitration."

ii. *The Board is the Appropriate Adjudicator in this Matter.*

In addition to Respondent's demonstrated animus towards Section 7 activity, deferral is inappropriate here because the current dispute is about whether Respondent's arbitration agreement violates the Act, rather than a contract interpretation issue. Given the implications of Respondent's agreement on rights afforded to employees within the Act, the Board, rather than a private arbitrator, is the logical adjudicator.

The Board has deferred disputes to arbitration when employees elected an exclusive bargaining agent to negotiate a collective-bargaining agreement that includes a grievance-arbitration mechanism. *United Tech Corp*., 268 NLRB 557, 559 (1984). When parties have an agreed-upon dispute resolution method, deferral functions as a postponement of the use of the Board's processes in order to give the dispute resolution method a chance to succeed. *Id* at 560. However, the Board does not wholly abdicate its statutory duty to prevent and remedy unfair labor practices. *Id* at 559. It retains jurisdiction of a deferred dispute, and can order additional remedies if Board law does not reasonably permit the arbitrator's award. *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 1127, 1128 (2014).

Therefore, even if a dispute goes before an arbitrator, the Board retains the ability to review the arbitrator's decision. However, under the terms of Respondent's agreement, the Board's review of an arbitrator's decision would be inconsequential because the arbitration agreement prohibits any remedy or recovery from the Board. This is contrary to the goals of the Act, and the Board's deferral policy. In *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972), the Supreme Court determined that no legitimate justification could be offered for interfering with Congress' intent to secure complete freedom for employees to access or participate in the Board's processes. Deferral is simply not appropriate here given the terms of Respondent's agreement.

Further, the Board has opted not to defer disputes to arbitration in non-union settings when individual statutory rights have been implicated. *Ralph's Grocery Co.,* 363 NLRB No. 128 (2016); *SEIU United Healthcare Workers-West*, 350 NLRB at 284 fn. 1 (finding that deferral was not appropriate when the issue is one of statutory interpretation, rather than interpretation of a collective-bargaining agreement).

As determined by the ALJ, Respondent's arbitration agreement interferes with the statutory rights of employees to access the Board and its remedies. Therefore, the Board should find that, in addition to Respondent's waiver of its deferral argument, deferral is inappropriate because the crux of the dispute is infringement on employees' rights under the Act.

C. The Board is Not Obligated to Defer Any Dispute to Arbitration.

Respondent argues that the ALJ was obligated to defer the dispute to arbitration because "there is no reason" why its arbitration agreement "cannot preclude obtaining an alternative remedy where full remedies are otherwise available through a timely filed demand for

arbitration." The reason Respondent seeks is Section 10(a) of the Act, which provides that the Board's authority to redress unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C § 160(a).

The Board is not obligated to defer any issue to arbitration even when parties have agreed to arbitrate a particular matter. *Collyer Insulated Wire*, 192 NLRB 837, 840 (1971) ("There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award.") Therefore, agreements between private parties cannot restrict the jurisdiction of the Board, and the Board may exercise its jurisdiction in any case of an alleged unfair labor practice as necessary to protect the public rights defined in the Act. *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1081-82 (1955). The fact that an injured party might have another remedy available for an unfair labor practice does not displace the authority of the Board to remedy it. *United Parcel Service*, 318 NLRB 778, 786-87 (1995) citing *Buck Brown Contracting Co.*, 272 NLRB 951, 953 (1984). As such, Respondent's contention that the Board is obligated to defer this matter to its unlawful arbitration agreement is plainly wrong.[3]

V. CONCLUSION

For the reasons set forth in this answering brief, the General Counsel respectfully requests that the Board overrule Respondent's exception because its deferral argument was

[3] Respondent cites two Supreme Court decisions, *Epic Systems Corp. v. Lewis*¸ 138 S.Ct. 1612 (2018) and *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009) for its contention that the ALJ was obligated to defer to its arbitration agreement. Respondent is mistaken, and neither holding supports its argument because the Board is not obligated to defer any matter. Further, unlike *Epic Systems*, there is no waiver of class action arbitration rights at issue. The issue here is whether Respondent's agreement unlawfully interferes with the statutory rights of its employees.

untimely. Further, absent the waiver resulting from the untimeliness, the exception should be denied on the basis that deferral is inappropriate where the primary matter at issue is whether the arbitration agreement violates the Act. Further, the Board is not obligated to defer any matter to arbitration, and is not bound by private agreements in its enforcement of public rights.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on July 13, 2018, a copy of the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge was served by e-mail on:

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